

Openness and Independence in Judicial Discipline Matters

The Honourable Chief Justice Allan McEACHERN*

I approach with hesitation the task of speaking in public about judicial conduct. Also with confusion because I have received conflicting advice. On the one hand, I am urged to speak up, explain the judiciary, and set the record straight. On the other hand, I am warned to be careful, not to be controversial or to appear defensive, and to be aware that everything I say will be misunderstood or misconstrued. Perhaps I should take refuge in my usual *persona* — bland and boring — which is natural enough for me and for most speakers except, of course, those taking part in this important conference.

One could gather from much legal and media talk, and from report writers, that there is a crisis of conduct in the judiciary, particularly in social context matters. I shall endeavour to demonstrate that there is no such crisis, but judicial conduct is such a vast subject that I shall concentrate on just one indicator of the state of the judiciary and its place among the other institutions of this blessed realm — that is the complaints that are actually made to the Canadian Judicial Council about federally appointed judges. I have chosen this narrow approach because since last February, I have been Chairman of the Judicial Conduct Committee of the Canadian Judicial Council. (Wherever I say "Chairman", please substitute its neutral equivalent. I use the formal term because that is how my position is described in the by-laws).

In fairness, the conduct of a judge should not be measured in the context of a complaint arising out of a single proceeding, but rather against a wider test of performance. Professor Simon Shestreet, in his seminal text on the English judiciary, *Judges on Trial*, states that the practice in that country, now amounting to a constitutional convention, is that judges should be left alone, except for collegial persuasion, unless there is a *prima facie* case for removal. It seems to be the view of many in this country that a judge's performance should be measured not against how they discharge their duties generally, but rather in terms of how a particular case turns out. Many who lose in court, or empathize with those who lose, cry out for justice — which they often equate to getting what they want. The trouble with that is that the other side also wants its different kind of justice. No jurisprudential system will ever satisfy those who seek subjective justice. Justice according to law is the best we can offer. I once received a letter from a disappointed litigant who said that he came to court for justice, but all he got was the rule of law!

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As I shall endeavour to point out, one cannot read and consider the complaints filed with the Council in the context of the huge number of decisions made by federal judges without concluding that we have an excellent judiciary. I certainly do not intend to suggest that we have a perfect system, or a perfect judiciary, but I will argue that, notwithstanding occasional missteps common to all human activity, much of what we have in place is appropriate and adequate, and that while perfection is a goal that will always elude us, the sky is definitely not falling.

I first wish to make a few observations about matters that may not be adequately understood by many Canadians.

First, a serious problem facing the judiciary is the incredibly high expectations, not of the public, but of individual litigants. Many expect that going to court will get them what they want. This can lead to disappointment and inspire real or feigned outrage over the outcome of their cases. As I wish to be as objective as I can on this occasion, I shall only pause to question the prevailing presumption that complainants are always right. Sometimes they are, but certainly not always. It must also be remembered that every misstep does not require a disciplinary response.

Second, judges are called upon, and expected, to make difficult and unpopular decisions. This audience knows that it is easy to be a popular judge. A good judge, on the other hand, adheres to a different more courageous standard.

Pervasive constitutional and practical questions overhang any discussion of judicial conduct. The terms of superior court appointments are well known to this audience. Those who speak so easily about intermediate sanctions, such as suspension, overlook a basic problem. If judges are suspendible, which I doubt, are they not "removed" for the period of the suspension? If so, can that punishment be administered other than by Parliament?

The Canadian Judicial Council has a legal opinion that it lacks the power to reprimand a federally appointed judge. The opinion indicates, however, that in disposing of a complaint, the Council can express disapproval of a judge's conduct to the complainant and to the judge. We do that in proper cases. Over the years in our annual reports we have described in general terms the most serious complaints. Disapproval can range from, "it would have been better if", "unfortunate", "unwise", "inappropriate" or, in a very few cases, something stronger.

On a practical basis, it is doubtful if some judges would be able to remain effectively on a bench — judging other persons — after being formally charged, tried and disciplined. Serious misconduct, of course, cannot be covered up or overlooked, but is it really in the best interest of the administration of justice to undermine the authority of the court and render a judge insecure in his independence for conduct not deserving removal? We have a jurisprudential system that has worked remarkably well by comparison with the rest of the world. Why put it at risk? Such a risk for conduct not deserving removal, in my view, threatens the independence of all judges, some of whom may not be able to avoid looking over their shoulder whenever they have to deal with a difficult or unpopular problem. I do not think this question has been considered sufficiently by critics of the

judiciary. For example, what is the onus? What rights of appeal will judges have against decisions of Judicial Conduct Commissions? And who will pay for all this process?

The restricted mandate of the Canadian Judicial Council respects our tradition of recognizing that you cannot combine judicial independence with judicial insecurity, particularly when dealing with difficult cases. Thus, the Council cannot become, as many complainants believe, a Court of Appeal reviewing and criticizing decisions made by judges, criticizing judges and setting aside or amending their decisions.

This rather reminds me of the time when I was a trial judge and a lawyer wanted me to do something only the Court of Appeal could do. When he persisted, I innocently said "Do I look like a Court of Appeal judge?" He thought for a moment and then asked "Which one"? Ask a stupid question, and you get a stupid answer.

Reformation of an occasionally rude or impatient judge is a collegial problem that can usually be handled within the court itself. The Council, on the other hand, is intended to deal with actual misconduct of a different and more serious kind.

Thus, when the Council receives a complaint, the first question must be whether it involves a matter which may lead to a recommendation for removal, an expression of disapproval, or just a disguised appeal against a judicial decision. Most complaints fall within that category — that is a disguised appeal — and the Council has no option but to inform the complainant, as politely as possible — and we try hard to be polite — that the complaint is not one that the Council can entertain.

Recently, for example, I received on the same day two complaints from the same province in family matters. Both cases were hard fought with experts on both sides. I suspect both cases could have gone either way. One judge gave custody to the father and the other gave maintenance to the mother. You will not be surprised to know that both complainants alleged the judge was biased against parents of their gender but no particulars were given except the fact that each suffered an adverse decision. I had to tell these complainants that their only recourse was to the Court of Appeal. I suspect that was regarded, in each case, as a brush off or a cop-out which is, in itself, "unfortunate".

Thirdly, another problem faced by all judges today, is the incredible pressures imposed by the volume of cases. It is not unusual for a judge of a busy court to face a list of twenty or twenty-five contested motions set for a single day, with another comparable list set for the next day, and the day after that. There is always another trial or motion waiting to be heard. To keep things moving, judges have no alternative but to be brief, blunt, and decisive — the stuff of which complaints are made of. Litigants, on the other hand, often see their cases as the only ones worthy of serious consideration, and they do not understand why the judge seems to be in such a rush to get to the next case.

You can see the dilemma, of course. We want a courteous bench, and we largely have one, but with increasingly difficult cases, and much volume delay, judges must impose firm control and keep the court's business moving. Thoughtful litigants must prefer a robust judge who maintains decorum and will not allow a litigant to waste the time of others. Sometimes, straight talk achieves that result. We must not convey the

message that judges must be gladly and interminably passive in the face of intolerable delay, bad lawyering (when it occurs) and other time consuming irrelevancies.

Our constitutional protection, however, cannot be a shelter for rude or intemperate judicial conduct displayed from time to time by a few judges. Our by-laws require that judges receive a copy of every complaint made against them, whether it is well founded or not, because it is useful for judges to know how their conduct has been perceived by others. Perhaps for this reason, or perhaps because judges have adapted themselves to the new and higher expectations of the public, we do not have much evidence of recidivism on the part of individual judges, which is a remarkable change from the days of my youth when much fiercer men — and in those days they were only men — presided in our courts.

However, the Council cannot respond in a draconian way to every misstep that may occur in judicial life. While counsel once told me in mitigation of his client's behaviour that "none of us is human", even very good judges occasionally exhibit a measure of fallibility. Although a very high standard of conduct is expected, judges cannot be expected to always perform perfectly in the difficult milieu of the courtroom.

My fourth observation is that most complainants seem to believe that the Canadian Judicial Council has a huge secretariat, unlimited resources and a large staff of lawyers, researchers and investigators who can uncover, "look into" or investigate any alleged, actual or imagined injustice. Invitations to undertake such investigations are often received. In fact, the total staff of the Council is the Executive Director and two secretaries. Complaints are only a part of the work load of the Council staff. Complaints are managed by the herculean, but necessarily part-time efforts of the Executive Director plus, of course, the part-time contribution of three Chief Justices, myself in Vancouver, Chief Justice Couture in Ottawa and Chief Justice Clarke in Halifax, and each of us also have other duties in our respective provinces.

So much for observations. I turn to the volume of complaints received by the Council.

First, by way of establishing context, there are 945 federally appointed judges. Conservatively, I estimate that each one of us presides over about 50 trials and upwards of 200 or more applications or motions each year. In Vancouver, Toronto and Montreal, a motions judge could hear 50 or more applications in a single week.

Collectively, therefore, the federally appointed judges conduct and decide upwards of 250,000 proceedings each year, and many of my colleagues think the total numbers are much higher than that. However, even half of that number, or 125,000 proceedings and decisions, would be ample for the purposes of my argument.

The number of judges against whom a complaint is made, although increasing each year, is under 200. I believe the reason for this increase is simply that the public is more aware than before about opportunities for complaint, and the Chief Justice of Canada has actually solicited complaints. I must remember to thank him for that. The annualized number of new complaint files opened in the last few years breaks down as follows:

1990 — 85	1991 — 115
1992 — 115	1993 — 164

The number for 1994-1995 will probably be greater than last year's 164, but probably less than 200.

These numbers demonstrate that the number of complaints against individual judges are small compared with the number of judicial decisions the judges make each year. Between 700 and 800 judges have no complaints made against them each year. While even one serious complaint is too many, the number of complaints overstates the problem because they are unweighed in terms of validity or seriousness.

I will now discuss the nature of the complaints received by the Council and the process by which we come to consider them.

Starting with the most serious cases it is notable that, unlike many countries, I do not know of a serious allegation of corruption in Canada against a federally appointed judge in the nearly half century I have been involved with the law. Since the Council was established in 1971, I am informed that there have been only a very small number of formal investigations and inquiries as to whether a judge should be removed from office. I personally am aware of only three, all of which may be known to you as they were either held in public, or were publicly known. Of these, two were formal investigations directed by the Council — one involving a judge who spoke out publicly about Quebec's veto and about aboriginal rights in the 1981 constitutional debate, the other concerning the fitness of a judge to continue in office because of ill health. The third was an inquiry directed by the Attorney General of Nova Scotia and concerned an unfortunate and insensitive phrase used in Reasons for Judgment.

These formal inquiries are expensive, time-consuming and troubling undertakings. For these and the reasons already mentioned, the Council accepts the English practice, under which a formal inquiry is only directed when a *prima facie* case for removal has been established. It is not surprising, therefore, that there have been so few formal inquiries. There may, of course, be cases where the likelihood of such an inquiry will lead a judge to resign. Our Annual Report for 1993-1994, which will be published shortly, will make reference to one such case.

At the present time, however, there are no cases in the complaints inventory where a formal inquiry has been recommended. In the last two inquiries, two lawyers were appointed to sit on the Inquiry Committee which held its hearings in public. I suspect that will always be the case in the future.

The balance of cases fall into two main categories. The first is where the complaint is largely about the decision of a judge. In these kinds of cases it is necessary to inform the complainant that his or her only remedy is by way of appeal, and the file is closed by the chairman.

Recently, we are seeing cases where the complaint is fundamentally about the result of a case but where there is also an allegation of bias or prejudice. We treat these cases more seriously, and we usually ask the judge for his or her comments before responding to the complainant. As mentioned earlier, it is useful for the judges to know how their conduct has been perceived by the complainant. However, in a great majority of these cases, no offensive language or conduct is identified. Instead, there is usually just an unsupported allegation of bias or prejudice.

The second category of complaint concerns something the judge said or did, or some antecedent or extraneous matter. It is often difficult to gain a proper understanding of the context of the proceeding just from the complaint despite the voluminous and often irrelevant material which is sometimes furnished. Few complaints are made by lawyers for clients, although most complainants were represented in the proceedings. Reasons for Judgment are seldom furnished by complainants. In such cases, a copy of the complaint is sent to the judge and to his or her chief justice with a request for comments. This is becoming increasingly common because of the changing nature of the complaints which are being received.

After the Council receives a judge's comments, which often include Reasons for Judgment, it is usually possible to make a decision about how to process the complaint. In most cases, the complainant is advised in writing, that no action will be taken on the complaint because it is, in the language of our by-laws "trivial, vexatious or without substance". Of these three options, "without substance" is usually the most appropriate.

If, in the opinion of the chairman or vice-chairman managing the complaint, there is a possibility of disapproval being expressed, the matter must be referred to a panel of chief justices. After deliberation, they may direct further fact finding enquiries, close the file with or without an expression of disapproval, or recommend to the Council that a formal enquiry be undertaken under the *Judges Act*.

In some other cases, the vice-chairman may think it necessary to make further enquiries before deciding whether or not to refer the complaint to a panel. This is usually done by asking someone like Professor Ratushny, or a senior lawyer in the area, to speak to witnesses and to the judge and to make a report. When that process is completed, the chairman or a vice-chairman must decide whether to close the file or to refer it to a panel. In 1993-1994, seven files were referred to panels. Those cases will be described in the forthcoming Annual Report. So far this year, although 99 files have been closed, none required an expression of disapproval, only two have required further fact finding, and only one has been referred to a panel. None of these cases are "social context" cases.

In 1993-1994, 94% of all complaints were closed by the chairs. I expect from what I have seen that the number to be closed without reference to a panel will probably be less than last year, possibly reflecting the less serious nature of the complaints being received.

Thus, it will be seen that the first stage in the management of complaints is a screening process. In any consideration of possible changes to the management of complaints, it is essential to look at the nature and degree of seriousness of the complaints before deciding upon changes. It is not my role to pronounce on this question, but my

opinion is that the seriousness of the complaints does not justify the establishment of a bureaucracy to screen and deal adequately with the present level of complaints. In other words, the degree of seriousness can be characterized as very low in most of the complaint files closed this year. I should perhaps add that of these, racist conduct was alleged in two cases and gender bias was alleged in five cases. None was judged to be well founded. Each was based upon the decision of the case and could be reviewed on appeal.

This is not to say that all these complaints are trivial or vexatious, although some of them are. Some minor triggering event, often arising in the midst of serious controversy or misunderstanding, or some deeply disappointed expectations, may have prompted a complaint that did not justify further proceedings by the Council. Examples might be an unfortunate comment made by a judge for which an apology has been tendered; or a blunt comment such as, "You borrowed the money and now you don't want to pay it back"; or a belief that a judge played tennis with a lawyer appearing before him when he did not, or that a judge must have been biased when the judge or jury delivered an unpopular verdict. The Martinsville Horror is an example of this. As noted in our press release on this case, a "not guilty" verdict led to petitions of complaints that the judge had delivered a biased or prejudiced charge. That was simply not so. Language used by the witnesses, or by counsel, was wrongly attributed to the judge. In the 1993-1994 period, there were more complaints of gender bias against men (11) than against women (8).

Complaints are sometimes made that judges refuse to listen, or have not read all the material in the file, or seem to be in a hurry and spoke sharply, unkindly, or in colloquial language. Very often, the judges who are not seen to listen are judges who have listened too long, and reached the time to move the case along, or to bring it to a decent end. In one case, a judge was said not to be willing to listen when he gave an hour's notice of closure at 6:00 PM on a Friday night after three days of argument on a straightforward matter. Judges cannot always be expected to read all the material that has been filed. They need only read what is necessary for the particular matter before them. There would be no time to hear argument if judges had to read the mountains of material that are filed on some motions. And what, I ask rhetorically, is a judge to do who has 30 or 40 or more family or practice motions on his or her list for the day and someone who has estimated an hour for his argument wants to take the whole day? Or what should a judge do when a trial threatens to over-hold unnecessarily into someone else's time?

My point is that there is no crisis in the judicial complaint business warranting the addition of layers of process, at least at the screening level. It takes a lot of time to get to the bottom of these complaints — to gain an understanding of the context — and I see no reason why that function should be elongated by having it done by a bureaucracy. This is not to say, for reasons I shall mention in a moment, that everyone should accept my opinion, or the opinion of future Chairpersons, on the assessment of these complaints.

In support of the foregoing, and in order to place my remarks in proper context, I wish to discuss a few more of the 120 files I have closed or managed since February of this year. I must speak only in generalities, as it would not be fair to discuss some individual cases. About half of these cases have been finalized and closed, and the other half are in transit awaiting comments from judges or for other reasons.

First, 110 of these 120 complaints were made against trial judges, 9 were against Appeal Court judges and one against the full Supreme Court of Canada for not giving Reasons for Judgment on a leave application. I dismissed that complaint, but I gave reasons for doing so!

Second, 72 of these complainants had counsel on a part or all of their legal journey, but only two were supported by the lawyers involved in the matter. Both lawyers clearly had their facts wrong.

Third, about one half of these complaints arose on a trial. The balance were made about proceedings on motions or in pre-trial proceedings or for matters outside court altogether, such as complaints of conflict of interest, or friendship with lawyers, or sitting on a case in the town where the judge practiced many years ago, or other forms of alleged bias or interest.

The great majority of the total number of complaints are directed against the decision of a judge and can only be redressed, if at all, by a Court of Appeal. As already mentioned, I have found it necessary in the past eight months to refer only two cases for fact finding, and one of them to a panel of Chief Justices.

Is there a crisis in the judiciary? I shall repeat what has occurred in the recent course of judicial complaints:

- Judges make thousands of decisions and there are complaints about less than 200 of them;
- Each year, there are no complaints about 750 federally appointed judges;
- I know of no allegations of judicial corruption;
- I know of only 3 formal enquiries in my 16 years on the Council;
- Only a handful of judges have found it necessary to honourably resign before or in the course of complaint proceedings;
- Some form of expression of disapproval has been made in 34 cases, (7% of complaints) in the last 4 years; and
- Upwards of 94% of all complaint files are closed at the screening stage.

Accordingly, I suggest again that there is no crisis of conduct in the federal judiciary. In fact, what seems to have been overlooked by many commentators is that the overwhelming majority of federally appointed judges have never offended anyone or conducted themselves in a way justifying an expression of disapproval. This is a good record, particularly when it is remembered that judges operate in a crucible of controversy, where emotions run high, the ambience is often hurried, adversarial and confrontational, and the inevitable disappointment to one side, or perhaps both sides, is deep and personal.

I am deeply conscious that the above sounds highly defensive but I suggest a defence needs to be mounted. The sensitive age we live in makes it apparent that real or feigned outrage can be a reaction to thoughtless or relatively harmless comment. Judges are learning from experience that a casual, although possibly appropriate comment, or any inappropriate comment, may give rise to a complaint. The timid judges will avoid all comments that might give offence. I hope that most judges will continue to speak their minds, within the bounds of civility, regardless of the risk of a complaint. We must therefore expect that numbers of complaints may continue to increase during this age of pervasive criticism.

I wish to say a few words about non-judicial participation in the screening process. I am not persuaded that this is necessary because so many of our complaints are straightforward and it would be, in the words of Shakespeare, "wasteful and ridiculous excess" to construct an elaborate process to screen them. Nevertheless I note that a committee of the Canadian Bar Association, acting apparently upon a recommendation of Madam Justice Wilson, proposes that a form of disciplinary body be established in each Canadian province, comprised of judges, lawyers and lay persons, and funded by government, to take over the complaint process. I understand such a proposal is to be voted on at a meeting to be held in February 1995, in Prince Edward Island.

I am astonished that the Canadian Bar Association would put such an item on its agenda without the most careful study. Such study has not yet been undertaken in this country. There is a wealth of bad experience in the State Courts of the United States where Commissions on Judicial Conduct have become a growth industry and judges are pursued vigorously by modern McCarthys who delight in taking aim at judicial targets. This is not our tradition and I wonder if the Canadian Bar committee foresees the chill that would descend upon our benches when the judiciary sense that every misstep, or alleged misstep, in their daily round could lead to indictment and public trial by persons employed by government. What process could be more calculated to disturb judicial independence. We should remember Sir Harold MacMillan's observation that there is much good in this land waiting to be spoiled by well intentioned reformers!

Furthermore, if judicial independence can be compromised in this way, how can the legal profession expect to maintain its equally important independence? If the Canadian Bar Association sow the wind, it shall surely reap the whirlwind. I recognize that there is a risk that reading too many complaint files could breed a conceit that complaints will always be assessed accurately. Rather than turn the jurisprudential world upside down for a minuscule number of complaints requiring a disciplinary response, I believe we should engage one or more independent persons of unquestioned repute to audit the disposition of our complaints. We could furnish these persons with copies of every complaint and disposition letter and the file, if requested, so they might satisfy themselves that every complaint is being treated with the seriousness it deserves. Such a process, in my view, could go a long way towards assuring the public that there is no crisis in the federally appointed judiciary, rather than just taking my word for it.